

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 4:05-cv-00329-TCK-SAJ
)	
TYSON FOODS, INC., et al.,)	
)	
Defendants.)	

**STATE OF OKLAHOMA'S RESPONSE IN OPPOSITION TO TYSON
FOODS, INC.'S SECOND MOTION TO COMPEL**

Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma and Oklahoma Secretary of the Environment C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma ("the State"), respectfully requests that the Court deny Tyson Foods, Inc.'s Second Motion to Compel [DKT #1258] for the reasons that follow.

I. Introduction

The State has responded in good faith to 251 Requests For Admission, 144 Interrogatories, and 383 Requests for Production served by Defendants in this action, many of which overlap one another and/or are duplicative. To date, the State has produced over one million pages of documents from at least seven different State agencies. Responding to Defendants' discovery requests has required the involvement of dozens of state employees and attorneys. Nevertheless, the State has endeavored to respond in full to each and every discovery request served upon it.

Tyson Foods' Second Motion to Compel ("Tyson's Motion") accuses the State of refusing to comply with the discovery rules and even goes so far as to accuse the State of purposefully

obstructing the discovery process. Rather than arguing the facts and the relative context of the discovery in this case, Defendant Tyson Foods resorts to attacking the State, its employees and its attorneys by sprinkling the brief with *ad hominem* attacks that are baseless, outrageous and offensive. (See, e.g., Tyson's Motion, p. 10, accusing the State and its attorneys of being "pathetic"). Tyson's Motion contains exactly the type of rhetoric that Judge Frizzell admonished against in the June 15, 2007 hearing.¹

Instead of responding to Defendant Tyson Foods' invective, the State will explain -- clearly, calmly and concisely -- why its responses are adequate and why Tyson's Motion should be denied. As this Court has already recognized, grandstanding and unhelpful rhetoric have no place in this proceeding.

II. Argument

The State has attempted to summarize and respond to all of the various complaints lodged by Defendant Tyson Foods. From the outset, however, it is important to note that several of these complaints could have -- and should have been -- resolved in a meet and confer conference under the Local Rules. Although the State did participate in a meet-and-confer conference with Defendant Tyson Foods' counsel, and the State did explain why these complaints below were not valid, Defendant Tyson Foods has apparently ignored the State's explanations and now seeks the State to again explain its position, this time in briefing. For example, as explained below, Defendant Tyson Foods represents to the Court that it could not identify documents responsive to

¹ "... I think I need to, after reading some of these briefs, read a provision in the local rules, specifically local Civil Rule 83.8 on standards of practice specifically subsection E states, 'Lawyers should treat each other, the opposing party, the Court and members of the Court staff with courtesy and civility and conduct themselves,' excuse me, 'in a professional manner at all times.' And that includes the briefs. Apparently the standards, it's a little rough and tumble sometimes in Washington D.C. Let me just respectfully suggest that maybe those standards should be modified somewhat for presentation in the briefs in the Northern District of Oklahoma. Point taken?" June 15, 2007 Hearing Transcript, 80:1-13.

RFP #2, but neglected to inform the Court that Counsel for the State corrected any confusion caused by an error during transmission and clarified which documents were responsive during the meet and confer process. This is exactly the type of situation that the Local Rule tries to avoid through the meet-and-confer process. In any event, the State responds as follows:

A. The State's responses to Defendant Tyson Foods' requests for production were entirely proper.

Defendant Tyson Foods' claims that the State's alleged "most recent discovery abuse" lies within the State's response to Tyson Defendants' April 25, 2007 Requests for Production ("RFPs"). In short, Defendant Tyson Foods accuses the State of not producing responsive documents and generally referring Defendant Tyson Foods to thousands of pages of documents without the required specificity. But this is not true. The State, in its response to the RFPs at issue in this motion, either produced the responsive documents or referred Defendant Tyson Foods to the agency where it has previously provided these documents as described more fully below.

With regard to specific alleged deficiencies, the State responds as follows:

1. RFP #1

RFP #1 asked the State to produce documents that support "the listing of elemental chemicals on various EPA lists used in CERCLA is intended to include compounds of such chemicals for purposes of determining whether a chemical/chemical compound is a hazardous substance for purposes of CERCLA liability."² In the "meet and confer" regarding this Request, the State informed Defendant Tyson Foods that it was the State's legal theory that compounds of listed chemicals were included as hazardous substances for purposes of CERCLA, and that the

² The discovery requests and the State's responses are attached to Tyson's Motion. See Docket 1258-2.

State had no non-privileged documents to produce in response to this request.

The State's legal theory is foreshadowed in this Court's opinion in *City of Tulsa v. Tyson*. After analyzing the cases, in *City of Tulsa* this Court has essentially agreed that, at least for phosphorus, compounds of phosphorus are included as hazardous substances for purposes of CERCLA:

A hazardous substance is defined under CERCLA as "any toxic pollutant" listed under [33 U.S.C. § 1317\(a\)](#) and any hazardous substance under [33 U.S.C. § 1321\(b\)\(2\)\(A\)](#) of the CWA, "any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [[42 U.S.C.A. § 6921](#)]," and includes substances listed under the Clean Air Act, the Resource Conservation and Recovery Act ("RCRA") and § 102 of CERCLA. [42 U.S.C. § 9601\(14\)](#). A substance is considered hazardous under CERCLA if it falls under [§ 9601\(14\)](#) or is listed in the table of CERCLA hazardous substances found at [40 C.F.R. § 302.4](#). [B.F. Goodrich Co. v. Murtha](#), 958 F.2d 1192, 1199 1200 (2d Cir.1992). Phosphorus is listed as a hazardous substance under both the CWA and CERCLA. See 40 C.F.R. Table 116.4A pursuant to [33 U.S.C. § 1321\(b\)\(2\)\(A\)](#) of the CWA and 40 C.F.R. Table 302.4, pursuant to CERCLA § 102, [42 U.S.C. § 9602](#). There is no separate listing for phosphate

. . . .

CERCLA is a remedial statute that courts construe liberally to effectuate its broad response and reimbursement goals. [Murtha](#), 958 F.2d at 1198; [Alcan](#), 964 F.2d at 258. Based on the above cases, the Court concludes the EPA intended to include phosphorus compounds, such as phosphates, in listing phosphorus in Table 302.4. Whether expressed as PO₄ or another chemical combination of phosphorus and oxygen, phosphates contain phosphorus. Since elemental phosphorus is highly combustible, poisonous and so reactive that it does not occur free in nature (an undisputed fact in this case), the EPA likely contemplated liability for phosphorus in real, not theoretical, releases.^{FN14} Further, as recognized by the Third Circuit, a compound does not have to be toxic or be released in any threshold quantity to be classified as a hazardous substance under CERCLA. [Alcan](#), 964 F.2d at 261 64. Therefore, the Court finds that the phosphorus contained in poultry litter in the form of phosphate is a hazardous substance under CERCLA.

City of Tulsa v. Tyson Foods Inc., et al., 258 F.Supp.2d 1263, 1283, 1285 (N.D.Okla.2003)

(withdrawn in connection with settlement). Defendant Tyson Foods is obviously aware of this ruling, because at least some of the Tyson Defendants were parties to the *City of*

Tulsa case.

It is beyond the scope of a Rule 34 request for production of documents to require a party to produce its accumulated copies of legal opinions, statutes, etc., which its counsel has assembled. Such production would be the worst sort of intrusion into the work product of counsel and the attorney client privilege because it would reveal the precise “mental impressions, conclusions, opinions, or legal theories of an attorney . . . concerning the litigation.” Fed. R. Civ. P. 26(b)(3). In order to produce documents responsive to this request, the State would be producing documents protected as attorney-client privilege, attorney work product, and expert opinion.

In the “meet and confer” the State told Defendant Tyson Foods that it had no non-privileged documents responsive to this request. While the State has, and has produced, a great many documents showing the effects of phosphorus and other pollutants on the IRW, the State does not have any non-privileged or non-protected documents of a *factual* nature, as opposed to the law and legal materials supporting its legal theories, to produce that “the listing of elemental chemicals on various EPA lists used in CERCLA is intended to include compounds of such chemicals for purposes of determining whether a chemical/chemical compound is a hazardous substance for purposes of CERCLA liability” in response to this RFP. Should the State locate such documents of a *factual* nature, it will supplement its document production to include them.

2. RFP #2

RFP #2 asked the State to produce the “issued orders” and “agreements” entered into by the State with respect to improving the “WWTP facilities” in the IRW. Defendant Tyson Foods claims that the State has not produced responsive documents. This is wrong. The State has, in fact, produced the actual documents requested by Defendant Tyson Foods. (See Exhibit 1

hereto, emails transmitting in seven separate parts the Orders produced in response to this request.) Counsel for Defendant Tyson Foods disingenuously asserts that he is unable to determine which transmitted documents were responsive to this request. While some initial confusion was created by an error in transmittal of the documents, Counsel for Tyson Defendant Foods neglected to inform the Court that any such confusion was remedied by a meet and confer with Counsel for the State wherein the specific documents responsive to this request were identified.

The State, in addition to producing the actual orders and agreements responsive to these requests, referred Defendant Tyson Foods to these same documents that were previously produced to them at ODEQ. (*See* State's Response RFP #1.) For example, the State's supplemental response to Cobb-Vantress Interrogatory No. 14, Exhibit 5 hereto, states:

OKLAHOMA DEPARTMENT OF ENVIRONMENTAL QUALITY

1. Legal Division files which contain one or more consent decrees, judicial, administrative orders or settlement agreements were found in Legal Division Boxes 1-7. There are facilities/ respondents who are outside the watershed. This is because the files were pulled by county as they are kept in the usual course of business. [original attachments omitted]
2. The Water Quality Division boxes contain facility permit files. Clip 3 of File 2 of the facility file contains all enforcement orders for a given facility. Water Quality Division Boxes 1-21 contain facility files for Public Water Supplies. Boxes 26-31 contain permit and enforcement files for Municipalities. Industrial Files are located in Boxes 36-42. The ECLS division contains complaints in Boxes 1-9. [original attachments omitted]

The documents listed above, to which the State has previously referred the Tyson Defendants, contain the documents that the State produced in response to this RFP at issue. The State did not refer to this previous interrogatory response in its response to the RFP at issue, but it is illustrative of where the State has already produced this information. The State was not generally referring Defendant Tyson Foods to a mass of documents, but rather indicated that the

State has already provided this information in agency document productions.

3. RFP #5

RFP #5 asked the State to produce documents supporting its claim that the constituents of poultry waste have been found throughout the IRW. The State indicated that it had provided numerous documents that show the degradation and pollution of the IRW from the constituents of poultry waste. The State's response was that it has previously identified documents responsive to this request in response to other discovery requests, produced them at agency productions, and produced an index of its Scientific Production. The State contends that its entire Scientific Production is responsive to this request. See index of scientific production Exhibit 2 hereto. The State did not identify any new documents that are responsive to this request. This RFP had been asked and answered in previous discovery responses and although the State has fully responded to this RFP, it is overly burdensome to continue to respond to requests for production of essentially the same documents already produced.³

4. RFP #7

RFP #7 asked the State to produce all documents that constitute the evidence of the amount of poultry waste applied in the IRW by poultry producers under contract with each defendant. (The State has asked the same information of the Tyson Defendants and has not received a full and satisfactory response to date from the Tyson Defendants). In any event, the State referred Tyson to Oklahoma Department of Agriculture Food and Forestry ("ODAFF") documents (that have been produced twice previously) and to its Scientific Production. ODAFF

³ See Attached the State's Original Response to Tyson Chicken Interrogatory Nos. 1-11, Exhibit 3 hereto, and Supplemental Responses to Tyson Chicken Interrogatory Nos. 2-6, and 10, Exhibits 4 and 4A hereto, Supplemental Response to Cobb-Vantress Int. No. 5, Exhibit 5 hereto, Supplemental Response to Tyson Foods Interrogatory Nos. 7-10, Exhibits 6 and 6A hereto, and Supplemental Response to Tyson Poultry Interrogatory No. 2, Exhibit 7 hereto.

grower and applicator files are relevant because they contain information regarding the amount of birds, integrator, number of houses, locations of the houses, amount of poultry waste applied, nutrient management plans, inspection reports and violation notices. This information, taken together, can provide some information regarding Defendants generation of poultry waste in the Oklahoma portion of the watershed and is thus responsive. The State's Scientific Production, taken as a whole, is also responsive to this RFP. The State's response was adequate and proper.

5. RFP #20

RFP #20 asked the State to produce documents relating to its ongoing but not yet complete Natural Resource Damage Assessment. The State's response is that this is a matter of expert opinion and will be disclosed according to the scheduling order. The State has not identified any non-privileged or non-protected documents responsive to this request. This is a proper objection and response to this request for production.

6. RFP #28

RFP #28 asked the State to produce documents related to the costs incurred by the State for hauling poultry litter out of the IRW. The responsive documents were electronically mailed to Poultry Integrator Defendants on June 29, 2007 and July 2, 2007 as Exhibit 1, along with seven separate transmissions of orders and agreements, responsive to another request. Because of the volume of the orders transmitted in these seven parts, there may have been some confusion about this document. However, although this document was inadvertently mixed in with other documents during the transmission, the State has explained this situation to Defendant Tyson Foods and, although it was not disclosed to this Court, Counsel for the State specifically identified the document responsive to this request. The document produced in response to this RFP was a spreadsheet showing the costs associated with hauling litter out of IRW. *See* attached

Exhibit 8 hereto. The spreadsheet did include other watersheds, but that is because that is how the document is kept in the normal course of business and the IRW specific costs were set forth in a separate row and columns.

The State also referred Defendant Tyson Foods to its previous production at the Oklahoma Conservation Commission and Oklahoma Secretary of the Environment's Office, which contained the document produced as well as other related documents. (*See* attached Relevancy Logs of OSE, Exhibit 9 hereto, --Specifically, for example, Box 22 of the OSE production, "319(h), Task 800 documents" and Box 8 "Summary Pages, Poultry Litter Hauling Charts (2006)").

7. RFP #29

RFP #29 asked the State for documents relating to the States' costs in managing and disposing of poultry waste within or outside the IRW. The State produced the documents requested, referred to above in regards to RFP # 28, and which is attached hereto as Exhibit 8. The exhibit for this request for production included contracts with BMP's, Inc. that reflect the costs associated with managing or disposing of poultry waste outside the IRW.

The State also referred Tyson to its previous production at the Oklahoma Conservation Commission and Oklahoma Secretary of the Environment's Office, which contained the document produced as well as other related documents. (*See* attached Relevancy Logs of OSE -- Specifically, for example, Box 22 of the OSE production, "319(h), Task 800 documents" and Box 8 "Summary Pages, Poultry Litter Hauling Charts (2006)").

8. RFP #30

RFP #30 asked the State to produce ". . . all notices, advisories, written communications and other documents that comprise or relate to instances in which the State has advised people

not to swim in waters in the IRW.” The State referred Defendant Tyson Foods to a number of specific documents and to information available on the internet, including a fact sheet advising people not to swim in polluted water, as well as other reports (and their location) that show that the waters in the IRW are polluted. The fact sheet was not Illinois River-specific, but rather a state-wide warning, and therefore would obviously include the Illinois River Watershed within the reach of the warning. The State has not identified any other non-privileged, non-protected responsive documents.

9. RFP #33

RFP #33 asked the State for “. . . all notices, advisories, written communications and other documents that comprise or relate to instances in which the State has advised people not to eat fish which come from the waters in the IRW due to pollution or water quality conditions . . .”. The State provided a fact sheet regarding mercury in fish. This was the only non-privileged, non-protected document the State identified.

B. The State’s claims of privilege are proper and justified

1. The State never refused to produce a privilege log

Defendant Tyson Foods claims that the State refused to produce a privilege log even though the State had claimed certain privileges in its response. This is not true. The State advised Defendant Tyson Foods' Counsel there are no new documents the State was withholding on the basis of a privilege claim. There was no need for the State to produce a new privilege log for this document production as privilege logs covering the documents in the production had already been produced. In light of this fact, to characterize this as a "refusal" by the State to produce a privilege log is non-sensical.

2. The State's claims of privilege and work product protection are proper

Defendant Tyson Foods alleges that the State's claims of privilege are being asserted to give the State "license not to produce documents they deem unhelpful to their case." Tyson's Motion, pp. 6-7. In other words, Defendant Tyson Foods is claiming that the State is knowingly and intentionally hiding evidence. If Defendant Tyson Foods has evidence that the State is intentionally withholding evidence not favorable to it, then Defendant Tyson Foods should bring the properly substantiated motion, rather than making such a patently false claim in a motion to compel without any supporting evidence. The State has not withheld any document on the basis that it is unhelpful. The State has claimed a privilege only over those documents that the State has a good faith basis under the law for withholding. Whether the documents are "helpful" or "unhelpful" is irrelevant; they are simply privileged and that is the reason why they are being withheld from production. Further, the only documents not listed on a privilege log for productions to date that have not been produced are those documents which are not required to be listed on a privilege log in accordance with Local Civil Rule 26.4.

C. The State's burden objections are proper

Defendant Tyson Foods alleges that the State has improperly claimed that the discovery requested is unduly burdensome. The State did and does in fact believe that these discovery requests are duplicative and unduly burdensome. But unlike the Defendants in this action, the State has not withheld any document on the basis of this objection. The Tyson Defendants have refused to even begin to search for corporate-knowledge documents outside the watershed because they claim it is too burdensome and expensive. On the contrary, the State has never refused to search for documents at agencies and has never withheld any document on the basis of this objection.

Defendant Tyson Foods claims that the State is engaging “in a bad faith litigation by ambush strategy” by objecting to RFPs that Defendant Tyson Foods claims are central to this lawsuit. Tyson’s Motion, p. 9. This assertion is baseless (and like the other above-quoted claims, is an uncivil, unhelpful, and inappropriate swipe at the State and its attorneys). The State has produced all the documents that it has identified that are responsive to the various discovery requests. The only documents the State has withheld are those documents protected as attorney-client privileged, attorney work product, or expert opinion. Again, the State, unlike the Defendants, has not withheld a single document based upon burden objections.

D. Defendant Tyson Foods did not propound an RFP regarding damages

Defendant Tyson Foods claims that the State has refused to produce a single document regarding damages. But Defendant Tyson Foods did not even ask for this information in its April 25, 2007 RFPs. Defendant Tyson Foods correctly states it has propounded an interrogatory regarding damages and that the State was required to supplement its response and in fact the State did supplement its response. Defendant Tyson Foods has not moved to compel on that response, and it is improper to bring this issue up in a motion to compel on its April 25, 2007 RFPs as Tyson did not ask about damages in its RFPs.

Furthermore, Defendant Tyson Foods claims that the State has portrayed “themselves as impoverished State agents without the resources necessary to respond to discovery is pathetic and disingenuous.” Tyson Motion, p. 10. The State has never portrayed itself as impoverished State agents. The State has responded in good faith to the duplicative discovery requests from all Defendants. Defendant Tyson Foods rhetoric is unfounded, uncivil and unhelpful to the resolution of the resolution of the issues before the Court.

E. The State's document designations are proper

The State either provided the actual documents or indicated where they could be located. The State also indicated that the State has already provided much of the information requested by referring Defendant Tyson Foods to the agency where the documents were produced. Again, the majority of RFPs have been asked before and in those rare instances where a RFP asked for new information, the State has provided it.

Defendant Tyson Foods continues to feign ignorance about the documents in which the State has referred it. It claims that the State's referral to 18,000 pages of ODAFF files is not responsive to their request that asks about the amount of poultry waste applied. In fact, all of the grower and applicator files are responsive to this request. Defendant Tyson Foods also incorrectly claims that the State only referred it to the general production for "issued orders" at ODEQ and OWRB. However, the State actually produced all responsive orders and agreements to Defendant Tyson Foods and, in addition referred Defendant Tyson Foods to the previous document productions at the relevant state agencies to indicate that the State had already produced this information. The State was not trying to confuse Defendant Tyson Foods; rather the State was indicating that it had already produced these documents. Defendant Tyson Foods' claim that none of the documents identified in the State's previous indices are responsive to these requests is simply false.

Defendant Tyson Foods also asserts that the State has claimed that its Scientific Production was done in the ordinary course of business. The State never made this claim; rather counsel for Defendant Tyson Foods flippantly asked this question during a meet and confer, and the State responded that it is not in the "business" of bringing lawsuits and that it would consider his concern regarding the Scientific Production. The State contends that all of that production is

responsive to the requests as indicated. Defendant Tyson Foods may not like that response, but that is what the State contends.

III. Conclusion

The State has responded in good faith to Tyson Foods' Request for Production and the State has either produced the actual documents or referred Defendant Tyson Foods to where the State has previously produced responsive documents. The State's reference to previous document productions was simply to indicate that these documents have been produced previously.

Tyson Foods' Second Motion to Compel [DKT #1258] should be denied in its entirety.

Respectfully Submitted,

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I hereby certify that on this 24th day of September, 2007, I electronically transmitted the above and foregoing pleading to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

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